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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
	)	
Amendment of Rules and Policies	)	CS Docket No. 97-98
Governing Pole Attachments	)	
	)	
	)	

COMMENTS

BellSouth Corporation, on behalf of its affiliated companies, by counsel, files its comments to the Notice of Proposed Rulemaking issued in the above-referenced docket.[1]

INTRODUCTION

The Commission has sought comment on proposed modifications to the current pole attachments formula (the "Section 224(d) formula").[2] These proposed modifications are contained in an August 26, 1994 Petition for Clarification filed by Southwestern Bell Telephone Company ("SWBT")[3] and in a position paper filed by a group of electrical utilities on August 28, 1996 (the "Whitepaper").[4] The Commission also seeks submission of proposals regarding the

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1 In the Matter of Amendment of Rules and Policies Governing Pole Attachments, CS Docket No. 97-98, Notice of Proposed Rulemaking FCC 97-94 (released March 14, 1997) ("Notice"), Order DA 97-894 (released April 29, 1997) granting extension of time to file comments and reply comments.

2 47 U.S.C. § 224(d)(1); Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, *Report and Order*, 2 FCC Rcd 4387 (1987), *recon.*, 4 FCC Rcd 468 (1989).

3 Southwestern Bell Telephone Company, Computation of Rates for Attachment of Cable Television Hardware to Utility Poles, Petition for Clarification or in the Alternative, a Waiver, AAD 94-125 (filed Aug. 26, 1994).

4 Fujimoto, Gill & Monteith, Just and Reasonable Rates and Charges for Pole Attachments: The Utility Perspective (August 28, 1996).

implementation of pole attachment reforms related to issues not specifically addressed in the Notice, particularly proposals to ease the burdens of regulation for all interested parties.[5]

The Section 224(d) formula originally applied only to cable television systems; the Telecommunications Act of 1996[6] amended Section 224(d)(3) to extend application of the formula to both cable television operators who operate cable television systems solely to provide cable service and to telecommunications carriers who use their attachments to provide telecommunications services and that, at the time of passage of the 1996 Act, were not parties to a pole attachment agreement.[7] The Commission will soon promulgate regulations pertaining to a new, separate formula that will apply to attachments used by telecommunications carriers to provide telecommunications services (the "Section 224(e) formula").[8]

BellSouth is a member of the United States Telephone Association ("USTA"), the principal trade association of the LEC industry, and participated in the formulation of that entity's Comments filed in this proceeding. BellSouth generally supports the Comments filed by USTA and provides additional comments as follows.

I. PRIVATELY NEGOTIATED RATES SHOULD BE PRESUMED TO BE JUST AND REASONABLE UNDER SECTION 224 OF THE 1996 ACT

The Commission's Section 224(e) formula, which will be the subject of a future Commission rulemaking and which will apply to any telecommunications carrier that provides

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5 Notice at ¶ 47.

6 Telecommunications Act of 1996, Pub. L. No. 104-104, 104 Stat. 56, (signed February 8, 1996).

7 Notice at ¶5, n.18.

8 Id.

telecommunications services, will be prescribed in regulations that are to apply "when the parties fail to resolve a dispute over such charges."[9] BellSouth agrees with the Whitepaper that voluntarily negotiated rates should be the fundamental means of setting rates for distribution pole access.[10] BellSouth also agrees with USTA that if a pole owner and attacher are able to reach an agreement on pole attachments rates, the Commission should accede to the attacher's judgment that the rates being charged to it by the pole owner are, in fact, just and reasonable, whether the attacher is an entity subject to the Section 224(d) formula or the Section 224(e) formula.[11] As a matter of policy, the Commission should also strictly enforce compromise rates that were negotiated to resolve a dispute over the appropriate rate.

In light of this overarching policy favoring voluntary negotiations, the Commission should adopt several reforms to its current pole attachment complaint proceedings. The current rules require a summary by the complainant of steps taken to resolve a complaint prior to filing.[12] First, the Commission should adopt a rule that actually requires meaningful, good faith attempts to settle as a precondition to instituting a pole attachment complaint. Second, the Commission should adopt a rule that prohibits an attack, through the Commission's pole attachment complaint procedures, of a rate that has been voluntarily negotiated in a settlement agreement reached by the

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9 47 U.S.C. §224(e)(1).

10 Whitepaper at 3-5.

11 USTA Comments at 2-3. Such a negotiation could, of course, be based on the utility's computation of a rate using the §224(d) formula.

12 47 C.F.R. § 1.1404(I) provides:

> The complaint shall include a brief summary of all steps taken to resolve the problem prior to filing. If no such steps were taken, the complaint shall state the reasons(s) why it believed such steps were fruitless.

parties. Finally, BellSouth supports the Whitepaper's call for certification procedures for Section 224(d) entities,[13] and urges the Commission to amend its pole attachment rules to require such certification be made a part of the complaint.

Last fall, BellSouth was served with a "combined" Section 224/Section 208 complaint, a part of which involved an attack on a conduit rental rate that was voluntarily negotiated by the state cable telecommunications association complainant and memorialized in a settlement agreement.[14] Furthermore, BellSouth had no notice of the state association's problem with the negotiated conduit rental rate until it received a copy of the complaint, yet the state association could justify filing its complaint about the negotiated conduit rental rate under the current rules.[15] In an earlier pole attachment complaint, a separate state cable television association complainant mailed a demand letter to BellSouth three days before Christmas, made no attempt to contact BellSouth by telephone before or after, and filed a complaint under the current rules the day before New Year's Eve. The dispute was susceptible to settlement, and in the event was settled, yet both parties had to endure the cost and inconvenience of dealing through formal litigation procedures, gathering the information required to be disclosed under the Commission's rules, obtaining orders, etc., simultaneous with negotiating a settlement. That particular dispute could

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[13] Whitepaper, pp. 18-19.

[14] Tennessee Cable Telecommunications Association, et al., v. BellSouth Telecommunications, PA No. 96-004 (filed October 22, 1996), dismissed without prejudice, Letter Order from Kurt A. Schroeder, Chief Formal Complaints Division, Common Carrier Bureau, to John D. Seiver, Complainants' Counsel (Jan. 1, 1997).

[15] The Association argued that a letter from BellSouth (in response to an unrelated demand for business documents that did not complain of any conduit rate) inviting the Association to call to discuss settlement of any good faith dispute over any pole attachment rate as an obvious attempt to stonewall the Association, and presumably therefore, evidence of why telling BellSouth about its problem with the negotiated conduit rate would have been "fruitless."

have been resolved just as easily, and with less expense and inconvenience to the parties and Commission staff, had settlement negotiations been instituted through a simple phone call rather than formal service of a complaint.

With the clarifications advocated in the instant rulemaking, disputes arising regarding the appropriate rate under Section 224(d) should be much more susceptible to pre-complaint resolution and settlement. Adopting a rule that would require such dispute resolution would ease the regulatory burden on parties and the Commission by avoiding the unnecessary expenditure of time, money and personnel resources that inevitably result when a pole attachment complaint is filed.[16]

II. THE COMMISSION'S PROPOSED PART 31 TO PART 32 ACCOUNT MAPPING IS WELCOME AND LONG OVERDUE

In BellSouth's experience, tremendous time and resources have been spent in attempting to reconcile the conversion from Part 31 to Part 32 accounting, which occurred in 1988, with the Commission's 1987 revision of its pole attachments formula, which was based on former Part 31 accounts. Limited Commission guidance previously available was not comprehensive, was susceptible to different interpretations, and was not, in any event, the product of notice and

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[16] In comments filed in CC Docket 96-238, Telecommunications Resellers Association stated that Section 208 complainants "should be required to raise with prospective defendants the concerns that would underlie such actions, prospective defendants should be required to respond to such overtures expeditiously and in good faith, and both parties should be obliged to exercise reasonable, good faith efforts to resolve the controversy." Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 96-238, TRA Comments (January 6, 1996) at 10. BellSouth believes that both the complainant and the respondent to a pole attachment complaint should be under reciprocal obligations to certify, in their complaint and answer, that they have complied with such pre-dispute resolution efforts.

comment rulemaking. When disputes arising over different Part 31/32 conversion methodologies appeared before the Commission, the Commission would respond by delegating authority to a hearing examiner to determine how expenses tracked under Part 32 rules today would have been tracked under Part 31 rules prior to 1988.[17] Because of the nature of the former Part 31 accounting rules, however, such a "reconstruction" was much easier said than done. BellSouth commends the Commission for establishing through this rulemaking the definitive Part 32 account mapping which will add certainty to the Section 224(d) rate process. BellSouth urges the Commission to issue its decision with respect to Part 31 to Part 32 conversion at the earliest possible opportunity so that 1998 rates, based on the modified formula, can be promptly established, and notice thereof mailed to Section 224(d) attachers on or before November 1, 1997.

III. THE COMMISSION'S PROPOSED GROSS BOOK METHODOLOGY WILL RESOLVE THE DEPRECIATION RESERVE PROBLEM IDENTIFIED IN THE NOTICE, BUT SHOULD NOT BE SUBSTITUTED FOR THE COMMISSION'S CURRENT FORMULA

Accumulated depreciation balances do not currently exceed BellSouth's gross pole investment in any of the nine jurisdictions in which BellSouth is authorized to provide local exchange and exchange access service.[18] BellSouth does not anticipate that, in the near future, accumulated depreciation balances will exceed gross pole investment in any of these nine

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[17] See, e.g., Multimedia Cablevision v. SWBT, CS Docket No. 96-184, PA 95-008, Hearing Designation Order (September 3, 1006) at ¶ 32.

[18] Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee.

jurisdictions in the near future. All of the rates developed by BellSouth pursuant to the Commission's pole attachments formula in such jurisdictions are "positive" rates.

The Commission has proposed two alternatives for dealing with the SWBT "negative rate" situation. The first approach would be an "adjusted net book" accounting that would be applied on a case by case basis, and specifically limited to those circumstances as suggested by SWBT.[19] Alternatively, the Commission proposes calculating pole attachment rates using gross book costs instead of net book costs.[20] BellSouth agrees with USTA that the gross book approach does solve the SWBT "negative rate" problem.[21] As stated above, BellSouth has not experienced the SWBT "negative rate" problem. As a practical matter, BellSouth has not experienced any problems with the Commission's current net book approach (except for the Part 31/32 conversion issue which will be cured by the present rulemaking).

As the Commission has noted, it has decided certain cases using gross book costs to calculate maximum reasonable pole attachment rates, and it has stated that if both parties to a pole attachment complaint agree, the pole attachment rates may be computed using gross book costs.[22] On the other hand, USTA points out a number of practical difficulties with the proposed "corrected" net book method.[23] In light of this, the Commission need not mandate a wholesale change in the inputs to the pole attachment formula, but should specifically allow utilities to calculate pole attachments rates using the gross book method whenever accumulated depreciation balances exceed gross pole investment.

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19 Notice at ¶ 27.

20 Id. at ¶ 29.

21 USTA Comments at 5-7.

22 Notice at ¶ 29.

23 USTA Comments at 8-10.

IV. USTA'S REQUEST FOR CONFIRMATION REGARDING CALCULATION OF ACCUMULATED DEFERRED TAXES SHOULD APPLY TO THE COMMISSION'S PROPOSED CONDUIT FORMULA.

BellSouth agrees with USTA that only pole-related accumulated deferred taxes should be utilized within the pertinent attachment formulae.[24] Under the Commission's current[25] and modified as proposed[26] pole attachment formulas, net pole investment is derived by subtracting "Accum. Deferred Income Taxes, Poles" and "Accum. Depreciation, Poles" from Part 32 Account 2411. Pursuant to Part 32 Rules, BellSouth is required to maintain separate and accurate figures for the accumulated deferred income taxes applicable to poles and conduits.[27] In its proposed conduit attachment formula,[28] however, the Commission sets out a methodology to derive "Accumulated Deferred Income Taxes (Conduit)" that has no basis in the Commission's current or modified as proposed pole attachment formula and which improperly introduces non-conduit related deferred taxes into the subsequent rate calculations.[29] The Commission should delete the Accumulated Deferred Income Taxes (Conduit) "formula" from Appendix C, and clarify that utilities are entitled to rely on their Part 32 accounting records to ascertain the actual amount of accumulated deferred taxes attributable to conduit and pole plant.

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24 USTA Comments at 18.

25 Supra n.2.

26 Notice at App. A.

27 47 C.F.R. § 32.3100(a)(1).

28 Notice at App. C.

29 USTA Comments at 18.

CONCLUSION

BellSouth welcomes the Commission's attempts to modify its current pole attachment formula, and supports the proposed Part 31 to Part 32 mapping. The Commission should clarify that LEC utilities may rely on the accumulative deferred taxes balances recorded pursuant to the Commission's rules in setting rates for all pole attachments, and delete the formula for deriving accumulated deferred taxes (conduit) from its proposed conduit rate formula. The gross book methodology should at a minimum be allowed on an exception basis when accumulated depreciation balances exceed gross pole investment in a jurisdiction.

The Commission should adopt the Whitepaper's Section 224(d) entity certification procedures, and make such certification a procedural requirement in any pole attachment complaint relying on Section 224(d). The Commission should further adopt rules that establish meaningful predispute resolution efforts as a precondition to instituting a pole attachment complaint, and that prohibit attacking rates that have been voluntarily negotiated by the parties. reached in a negotiated settlement of a dispute between the parties.

Respectfully submitted,

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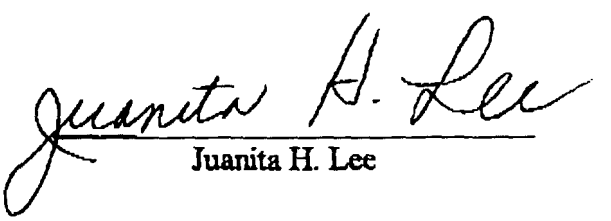
DATE: June 27, 1997

CERTIFICATE OF SERVICE

I hereby certify that I have on this 27th day of June, 1997 served the following parties to this action with a copy of the foregoing **COMMENTS** by placing a true and correct copy of the same in the United States Mail, postage prepaid, addressed to the parties listed below.



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